Central Law Journal.

ST. LOUIS, MO., APRIL 13, 1917.

PRESENT STATUS OF THE UNIFORM LAND REGISTRATION ACT.

The TorrensSystem of Land Registration, modified to meet constitutional requirements, has been adopted in varying form in fourteen of the states of the union and in Hawaii and the Philippine Islands, the most recent acts being those of South Carolina and Virginia. The latter state has passed the Uniform Land Registration Act which was drafted by Hon. Eugene C. Massie, a Virginia lawyer, and after three years of consideration by the Conference of Commissioners on Uniform State Laws, was recommended by them for adoption by the legislatures of all of the states. It is now under consideration by a special commission in Pennsylvania and will no doubt be introduced into the legislatures of other states during the sessions of this winter.

In a manual (Manual of the Uniform Land Registration Act, Eugene C. Massie, Richmond, Everett Waddey Co.), prepared with special reference to his own state, Mr. Massie gives a condensed history of the movement for land registration which he believes will eventually revolutionize the ancient methods of transfer of title and mortgage of real estate. Land registration is not a novel idea in countries where the common law has never prevailed. From the brief of the Attorney General of Massachusetts, in Tyler v. Judges, 175 Mass. 71, it appears that registries of ownership have existed in Bohemia from time immemorial, in Vienna as early as 1368, in Prague in 1377, in Munich in 1440. It has been universal in Austria since 1811, was adopted in Saxony in 1843, in Hungary 1849-56, and in Prussia in 1872. The problem so well solved by the Torrens Act in the Antipodes still confronts the great majority of the United States.

It is believed the solution will be found in the Uniform Land Registration Act. It is not compulsory, but the advantages are so great that it is believed it will make its way wherever it obtains. It takes away the necessity of a laborious examination of title, for when land is registered the owner's duplicate certificate of title attests his ownership. Thus it can be used as collateral or transferred as readily as a registered stock or bond. Taxes are settled when land is registered and thereafter delinquent taxes are registered on the certificate.

Either an existing court or a special court for land registration may be vested with the jurisdiction conferred by this act. In Massachusetts a separate court has been created and this is deemed to be the best method, but for reasons of economy many states will make use of existing courts. Proceedings are by petition, and except as otherwise provided, the general rules of pleading and practice in equitable actions prevail. The clerks of courts are constituted registrars of title. Suit is begun by petition to the court by anyone claiming to own land or to have power of appointing or disposing of an estate in fee simple. Upon the filing of the petition it is referred to an examiner of title, an attorney-at-law appointed by the court. Such examiners are standing officers, though a special examiner may be appointed. Great care is shown in the sections relating to notice and the fact of notice. Any person having any interest or claim against the land, whether named in the petition and order of publication or not, may appear and file an answer at any time before final decree. After a decree has been rendered and duly entered of record in the registry of titles, it is known thereafter as the original certificate of title. An exact copy of this certificate of title shall be made and marked "owner's duplicate" and delivered to the owner. Whenever any registered estate is transferred and the transaction is duly noted and registered, the certificate of title

and any duplicate is cancelled by the registrar and a new certificate entered, and a duplicate issued as the case may require. If only a portion of the estate is transferred, or in case of an encumbrance or a lease for more than one year, the transaction is duly noted and registered; a new certificate is entered and a new duplicate issued for the portion transferred and the portion not transferred. All registered encumbrances are noted on the certificates of title. In voluntary transactions the duplicate certificate must be presented with the instrument filed for registration. Thereupon the registrar is authorized to register the transaction under the direction of the court upon proof of payment of all delinquent taxes and levies, if any. In involuntary transactions a certificate from the proper officer is sufficient authority for the registration of the transaction under the direction of the court.

Without further analysis of this very carefully drawn act, its significance will readily appear. It is well worthy of consideration by the profession, for its eventual success will work a revolution in transactions relating to real estate.

W. G. S.

JURISDICTION OF BANKRUPTCY COURT IN PLENARY SUIT AGAINST STOCKHOLDERS OF BANKRUPT CORPORATION.

In Kelley v. Aarons, 238 Fed. 996, decided by district court of southern district of California, the interesting question is presented whether, though a single suit in equity may be brought by a trustee in bankruptcy against subscribers to stock in a bankrupt corporation upon their unpaid subscriptions, this may be done in a jurisdiction where some of the subscribers do not reside.

In justification for resort to a court of equity it is said: "The fact that it is a proceeding to enforce the collection of a trust fund, and also because of the great number of defendants and the fact that only such an amount as will be necessary to pay the debts and expenses of administration of the bankrupt corporation can in any event, be collected from the solvent stockholders, makes it necessary, that one suit in equity should be presented in order that by an equitable collection and distribution of the assets such as is possible only in a court of equity, complete relief may be had and complete justice may be done in the premises."

Several decisions by the Supreme Court are cited to this proposition. But the principle seems so evident that no great amount of authority seems needed.

Taking it, then, that the principle is correct, it would seem to follow, that its recognition is inherent in the bankruptcy act and necessary for its workable efficiency. It comes into every contract so far as the possibility of that coming within the purview of the bankruptcy act is concerned. Contracts are made subject to such a contingency.

The court in this case, however, reasons that, as the corporation itself could sue only at law and in a jurisdiction having *in personam* jurisdiction over subscribers, this equitable remedy is eliminated by this fact. But the view in this statement is that the unpaid portion of a subscription is not a trust fund until a corporation becomes insolvent. Further it is said, that then not the whole of this unpaid portion is a trust fund but only that part which is needed to pay the corporation's debts.

It seems, therefore, apparent that the right to bring a suit in equity, in a case of this kind, goes to the efficiency of the bankruptcy act. There can be no doubt that Congress did not intend, that any power to appeal to courts in the proper administration of this law should be lacking. Jurisdiction, therefore, in the

widest way was vested in the courts to aid in that administration.

The court in holding that, as the court could not bring in non-resident subscribers, therefore it could not entertain the suit at all, remits the trustee to the same sort of an action that the corporation before it became insolvent might have brought. But when it announced that an equity suit for the bankrupt corporation by its trustee could not be brought for the entire unpaid part, but only for what was necessary to pay up indebtedness within that amount, how may it be said he can sue at all as the corporation might have sued?

The court refers to Bardes v. Hawarden Bank, 178 U. S. 524, in support of its ruling. In that case there was a suit to set aside a conveyance made in fraud of creditors of the bankrupt and as the bankrupt himself could not have brought the suit in the court where the trustee brought it, neither could he. In that case the court said: "The bankrupt himself could have brought a suit to recover property, which he claimed as his own against one asserting adverse title in it, and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action and not the jurisdiction of the court to entertain and determine it."

But, if the bankrupt could in that case have brought the suit, it could only have brought it for the very same thing that the trustee could. The efficiency of the bankruptcy act is not involved in compelling the latter to go into a jurisdiction where he can obtain every relief that the bankruptcy act contemplates he shall obtain.

In this case there can be no court where all conditons of jurisdiction may exist and, taking it that it is necessary for the practical working of the bankruptcy act, that an equity suit shall be brought in some court so that all assets may be collected, the presumption is that in some court every party, whom it is necessary to join with another to give complete justice, is amenable to the jurisdiction of that court. A statute should not be left to fail of its purpose—at least such a statute as the bankruptcy act,—because of any such reasoning as the district court follows in this case. This decision appears to cut out the very vitals of the bankruptcy act.

NOTES OF IMPORTANT DECISIONS.

GARNISHMENT—JUDGMENT DEBTOR IN ANOTHER COURT.—In Hardwick v. Harris, 163 Pac. 253, decided by Supreme Court of New Mevico, a decision reversing a district court has been handed down, which, conceding the correctness of the judgment of the lower court, yet reverses its holding.

The question involved was the right of a creditor of a judgment debtor in a judgment rendered by the Supreme Court, to garnish the debt in an action against this debtor in the state district court.

As is perceived, this is not a question of the garnishment of a judgment in favor of one, but of a judgment against one, that is garnishing judgment debtor and not judgment creditor. In the former situation, there is merely the garnishing of a liquidated demand; in the other case, there is arresting the operation of a judgment for fear the plaintiff may assign it or come into possession of its fruits before his creditor may interpose.

A judgment is assignable almost with the same facility as a negotiable instrument may be transferred. A maker of a note does not owe a particular person, but he does owe the legal holder of the note. The only exception we know of to this rule is in favor of the maker where the note is transferred with notice of dishonor. A judgment debtor does not owe any other person than the owner of the judgment. May a mere summons upon the defendant arrest his right to assign his judgment? It seems to us that, if the answer be yes, a door is opened to defraud a purchaser in good faith of the judgment. There is no presumption of dishonor because of a judgment being overdue, but

a purchaser may act upon the state of the record.

Would a judgment plaintiff be guilty of any contempt of court in assigning his judgment after notice or knowledge of the defendant being garnished? We greatly doubt that he would, because execution on the judgment would not be in any way interfered with.

The court cites cases and draws the conclusion that the weight of authority supports the rule against garnishment in such a case, but says the judgment debtor could ask relief by *audita querela*, and the costs entailed on the garnishee, which he might not be entitled to recover from the garnishing creditor. The court says: "This may be conceded to be true, but in comparison to the great benefit to the people at large by reason of our holding this occasional inconvenience and loss must yield." How would it be an "occasional inconvenience and loss," if it happened every time this sort of garnishment is resorted to? It is more like a necessary loss and there seems no reason for saddling it on another party.

The court says, in conclusion: "In reversing this case we wish to say that the district court was evidently entirely justified in the action which it took in so far as the point under discussion is concerned. * * * This court, however, has the power and it is its duty to so mold the law of the state as to bring about a harmonious system calculated, in its opinion, to work out the greatest good to the people." But this power seems only a discretionary power as to future holdings and does not go to the extent of taking away any right in a judgment lawfully rendered. In this case it took away a party's vested right, as the court impliedly says.

BULK SALES LAW—SUBROGATION TO RIGHTS OF CHATTEL MORTGAGEE WHO WAS PAID BY PURCHASER.—In Hicks v. Beals, 163 Pac. 83, decided by Oregon Supreme Court, it was ruled that where a purchaser of a stock of merchandise failing to comply with Bulk Sales statute as to giving notice to creditors, paid off a chattel mortgagee at the time in possession under his mortgage, but omitted to have the mortgage assigned to him, and it was released of record, he may sue to have the mortgage revived, and be subrogated to all the rights of the mortgagee to intervene in an attachment suit by the seller's creditors to subject the stock to their claims.

There are averments by the plaintiff of ignorance of the bulk sales law as excusing his not attempting to comply with its provisions, his paying the mortgagee as part of the purchase price, his lack of knowledge of the seller having creditors, and his entire good faith in making the purchase. A decree granting the relief prayed for was affirmed by the supreme court.

We lay no great stress on the averments in plaintiff's petition, because all of them turn upon his ignorance of the Bulk Sales statute. Nevertheless, we think the ruling was right.

Subrogation is an equitable right and the only thing that plaintiff did, in effect, was to get the property he bought out of the possession of the mortgagee and claim it as his own. In doing this he injured mortgagee's creditors in no way. He did, however, bring the Bulk Sales statute into play, by his contract of purchase. He could have done the same thing by having the chattel mortgage assigned to him and then purchasing the stock. It would be a harsh rule, indeed, that would make him lose, because of technical requirement that he could not hold a lien on property belonging to himself. As matter of fact, he would not be holding property belonging to himself absolutely, but only as a trustee for the seller's creditors. It seems to us the privilege of subrogation, which is an equitable principle, was well applied in this case.

EXECUTORS AND ADMINISTRATORS—ATTORNEY FEES IN DEFENDING WRONGFUL CHARGE OF MALADMINISTRATION.—It ought to be plain that the guardian of a trust fund should not cause its depletion by any misconduct of his own. And it also would seem plain that no controversy, even in good faith, about the management of such a fund, whether rightful or wrongful, should involve any cost to the fund. Such questions should be deemed wholly apart from the fund.

In Loring v. Wise, 115 N. E. 302, decided by Massachusetts Supreme Judicial Court, there were charges of fraud and conspiracy against an administrator. They were held to be unfounded and the administrator was allowed his expenses, including attorney's fees, out of the estate in defending his conduct.

The court in approving these allowances, said: "The general rule that executors and administrators who are obliged to employ counsel in the settlement of their accounts shall be allowed to charge to the estate their reasonable fees cannot be doubted. * * * In view of the charges of fraud made against the admin-

istrator, and of all the circumstances, it cannot be said that the employment of counsel was without justification, or that the charges for such services were unreasonable."

This case showed a very acrimonious and long drawn-out controversy, in which the estate was interested, if at all, only on the side of those assailing the accounts. If they were successful, the assets would be increased; otherwise, they would stand as they were. The objector having no right over the estate, yet puts it to the hazard of loss by an unsuccessful suit. It has been held, that if one sues to recover a trust fund, the one withholding may be taxed, if the suit is successful, with attorney fees incurred by plaintiff. Harrison v. Perea, 168 U. S. 311. Why should it not be that if he is unsuccessful, he should be made to pay all expense in defending an unfounded charge?

Suppose it be conceded that the administrator should not be saddled with such expense, if charges are unfounded, yet is it less unjust that the estate should? It had nothing with the controversy. We think there is here room for a statutory rule.

ACTION—RECOVERY OF MONEY PAID ON ILLEGAL EXECUTORY CONTRACT. — In Greenberg v. Evening Post Assn., 99 Atl. 1037, decided by Connecticut Supreme Court of Errors, there is discussed the interesting question, whether there is a *locus poenitentiae*, so that one in *pari delicto* may recover money advanced in a corrupt bargain.

The facts giving rise to the suit were that there was a prize contest conducted by a newspaper, and its canvasser managing it agreed that, if plaintiff paid him $300 he would so arrange the voting for candidates by procuring fake subscriptions, each subscription entitling a candidate to a certain number of votes, that plaintiff would win the prize offered. The newspaper knew nothing about this arrangement, until plaintiff repenting made demand on it for a return of his money, all prior to the contest being decided. Upon refusal to return the money, plaintiff brought an action for its recovery.

The court said, in speaking of plaintiff's case: "His action is founded, not on the bargain, but on his repudiation of it, before the contest was closed, or the prizes awarded, or the rights of other competitors impaired. The question is whether it is not quite as consistent with sound public policy to encourage the prompt repudiation of illegal and immoral contracts by permitting, under such circumstances, the recovery of money paid upon an illegal or immoral consideration, as to declare the money forfeited the moment it is paid, and thus discourage repentance in such cases. The defendant practically concedes that the weight of authority authorizes the recovery of money paid for a purpose which is merely illegal, in case the bargain is repudiated promptly and before it is performed by the other party; but it insists that the rule is otherwise where the money is paid under an arrangement involving moral turpitude. We fail to see the propriety of such a distinction. In either case the recovery is not allowed out of tenderness for the plaintiff, but in some cases on the ground that the maxim, *ex turpi non oritur actio*, does not apply, because the action is not brought on the corrupt bargain; in other cases on the same ground, supplemented by the consideration that the law ought to favor the prompt repudiation of corrupt bargains. In all these cases the reasoning of the decisions would apply regardless of the degree of corruption involved in the original arrangement. It is true that in some cases when the original transaction involved only *malum prohibitum* it has been suggested that no recovery would have been allowed had the original transaction involved moral turpitude. * * * We think the court correctly charged the jury that, in an action to recover back money paid for the purpose of carrying out a proposed illegal or immoral design, the plaintiff may recover upon proof that he seasonably repented of his bargain, and evidenced such repentance by repudiating the arrangement with reasonable promptness and before the other party had so far acted in performance of it as to carry any part of the illegal or immoral design into effect."

It was contended that the action did not lie, because the fraud here was a moral wrong and not merely *malum prohibitum*, but the cases cited and discussed held that recovery was to be based solely on the repudiation and not on the bargain, for example, Falkenberg v. Allen, 18 Okla. 210, 90 Pac. 415, 10 L. R. A. (N. S.) 494, where money was wagered on a fake footrace. But, if a newspaper was really conducting, or trying to conduct, a "square" contest, the repudiator ought to make it entirely whole as a condition precedent to right of withdrawal, and its agent should not have been deemed acting within his authority in making such a bargain. But this consideration induces the conclusion, that if it was promptly apprized, it ought to have been deemed to have ratified the arrangement, if it holds on to the money paid.

THE COTTON RESTITUTION FUND.

In the United States treasury is a fund of approximately five million dollars, or, to state it accurately, $4,690,774.79, derived from the sale of cotton taken fifty years ago, just after the surrender of Generals Lee and Johnston, from plantations and warehouses throughout the cotton states. This amount, or such part thereof as was taken from individual owners, is waiting to be turned over to such owners or their heirs, upon proof of property according to the statute in such cases made and provided, which, in these cases, is the law embodied in Section 162 of the judicial code. I do not wish to be understood as saying that five million dollars in actual gold, silver or currency has been lying in the treasury vaults half a century, nor is there at this present writing, Uncle Sam don't do business in that way, but it is and has been theoretically there, and is as good as there to the fortunate claimant as a judgment in his favor will be followed by speedy realization of the amount awarded by the court of claims.

To understand the origin and character of the cotton restitution fund, as it may aptly be styled, it is necessary to begin at the beginning, which was the 12th day of March, 1863, when Congress passed the Abandoned and Captured Property Act. The title clearly expresses the purpose of the statute, which was to provide for the disposition of such property as might be captured by the Union forces as they advanced south; also property abandoned by the enemy and appropriated by the United States troops. The law provided for the sale of property taken from the enemy or abandoned by the enemy; but for the purpose of protecting the interests of loyal owners whose property might be taken, it further provided that such owners might bring an action in the court of claims, and by proving ownership, sale and deposit of the proceeds of the sale in the treasury, recover such amount. The suit by loyal owners must be brought within two years from the close of the war. The time designated as the close of the war was exceedingly problematical in the early spring of 1863 when the law was enacted, but subsequent events show it to have been August 20, 1866, making the limitation of time for bringing suit August 20, 1868.

While the close of the war was the date above designated, as decided by executive proclamation and judicial decision, the actual close of hostilities was the 26th day of April, 1865, when General Johnston, following the example of General Lee, surrendered to the Union commander. While desultory fighting continued for a brief period in Texas, the actual war virtually closed with the surrender of the two great Southern leaders. Now the period of cotton operations may be divided into two parts: First, that before the surrender; second, that after the surrender. The conditions prevailing, the circumstances attending the capture and disposition of cotton, the legal character of the operations and of the property taken were radically different during each period.

During the actual hostilities, from the commencement of the Civil War to the surrender of the Confederate armies, cotton played a conspicuous part. It has been been appropriately called by the Supreme Court of the United States "the sinews of war to the Confederacy." During the first stages of the war it was exported in large quantities to Europe in exchange for munitions of war and other necessities for the people of the South. It was currency for the Confederate government and horse, foot and artillery to its armies. If its exportation had not been checked and well nigh prevented by the rigorous blockade of the Southern ports the war might have been indefinitely prolonged. Later, when exportation became practically impossible, large amounts were destroyed by the Confederate forces to prevent its falling into the hands of the United States troops, who,

in their turn, destroyed what they were unable to carry away to prevent its possession by the Confederate government. Large amounts survived the onslaughts of both Federals and Confederates, being found after the war stored in public warehouses and on plantations where it had been produced.

Numerous claims were presented to the Confederate Congress for the value of cotton destroyed by their troops to prevent it falling into the hands of the enemy, among them one from President Jefferson Davis for two hundred bales. For cotton captured or destroyed during this period, from the beginning of the war down to the close of actual hostilities, congress has made no provision by general law for the relief of owners, excepting the privilege granted to loyal owners to sue in the court of claims up to August 20, 1868. Special statutes may have been enacted in behalf of individuals, but no general measure has been taken to compensate parties for their propery captured or destroyed during the war, which is in accord with the well known principles of international law that no government can be held responsible for property destroyed in the track of war, whether belonging to friend or foe; the government is not liable, and cannot be held responsible unless such responsibility be assumed by voluntary act of the government.

Shortly after the surrender it was ascertained from captured Confederate documents, that large quantities of cotton remained on the plantations of owners, who had sold it to the Secretary of the Confederate treasury, taking in exchange Confederate bonds and giving bills of sale with an agreement to deliver it on call of the secretary at some designated point on the railroad or other convenient shipping place.

The Secretary of the Treasury of the United States appointed special agents to go south and collect the cotton disclosed by the Confederate documents and ship it to New York, where a general agent was appointed to sell it and deposit the net proceeds in the treasury. The authority of the special agents was confined to the collection of cotton that had been sold to the Confederate government, or taken from it, or captured during the war, and no other. They were authorized to take what was known as Confederate cotton and instructed to take no cotton from private individuals. The treasury regulations issued at this time showed that the department considered the war closed with the surrender of the Confederate armies so far as taking property under the Abandoned and Captured Act was concerned. Such was the only logical conclusion under the plain terms of the act, as well as the construction given it by the Supreme Court. The court held that abandoned property was that which had been abandoned by the enemy, that captured property was that which had been captured from the enemy. Since the enemy had laid down its arms and submitted to the Federal government, there was no enemy from whom to capture property, neither was there any enemy to abandon property, hence the Abandoned and Captured Property Act had passed away with the conditions that led to its enactment.

The special agents appointed by the secretary of the treasury and provided with information derived from the Confederate records, set out to gather together the cotton within their respective districts. The cotton collected by them was forwarded to some available point on the railroad or to the most convenient seaport from whence it was shipped to New York, sold, and the proceeds deposited in the treasury where it still theoretically remains, constituting the five million dollar cotton fund.

If the treasury agents had adhered to their instructions, and made no mistakes in taking cotton, and had been perfectly honest in their operations, then, none but cotton that had been sold to the Confederate government would have been appropriated and sold, and the money in the treasury would be the proceeds of the sale of prop-

erty for which no individual claims would lie, as the Supreme Court has decided that cotton sold to the Confederate government, for which Confederate bonds had been received in payment, became the property of that government and upon its downfall reverted to the United States. But treasury agents did not adhere to their instructions, mistakes were undoubtedly made in taking some cotton and far more was taken with dishonest intent, so that thousands of bales were taken from Confederate storehouses or other sources, the proceeds of which never reached the United States treasury.

Conditions existing at the time the treasury agents went forth to find and appropriate Confederate cotton were peculiar. The cotton that had escaped the ravages of the war was scattered over the cotton belt. Some was stored in Confederate warehouses, some in possession of individuals, some had been spirited away and hidden in the woods, some, and probably, much the larger part of the Confederate cotton, still remained on the plantations of the owners who had sold it to the Confederate secretary of the treasury. The former owners, who still retained the property in their possession, which they had sold for bonds which had become valueless by reason of the downfall of the Confederacy, were naturally averse to giving it up. Individuals who owned no cotton were desirous to obtain a share of Confederate cotton which appeared to be regarded as common prey to whoever could get hold of it. The informer also infested the land, ready to point out hidden cotton to the government agent who would share with him. The times were propitious for graft and grafters were not wanting, and last of all, most important of all, and worst of all, were some of the United States treasury agents. I do not indulge in wholesale denunciation of the government agents sent south by the Secretary of the Treasury in those troublous days. I believe such condemnation to be as untrue as it is unjust, but too many were represented by the energetic official who loaded a ship with cotton and sailed with it to France, presumably never to return to the United States.

Numerous complaints to Congress were made by individuals that their cotton had been wrongfully taken from them by treasury agents under the pretense that it was Confederate property. Finally, on the 18th of May, 1872, Congress authorized the secretary of the treasury to investigate such claims and make restitution in such cases as he found to be well founded. Under the act, the secretary's jurisdiction continued only six months, during which period claims were presented for 136,000 bales of an estimated value of $13,600,000; an allowance was made of only $195,896. The act of May 18, 1872, expired on the 18th of November of the same year, from which date no relief was granted by Congress to cotton claimants by general law, until given by a law taking effect January 1, 1912, conferring jurisdiction upon the Court of Claims to hear and determine the claims of owners whose cotton had been taken under the provisions of the Abandoned and Captured Property Act subsequent to June 1, 1865, and upon proof of ownership, taken by a treasury agent, sale and deposit of the net proceeds in the treasury, said claimant to recover said proceeds. Some eight hundred cases have been filed in the Court of Claims under the above act, amounting, in the aggregate, to about $14,000,000.

The relief granted by the statute is limited to owners whose cotton was sold and the money derived from the sale placed in the treasury. The restitution is limited to the fund in the treasury produced by the sale of such cotton. Congress does not provide compensation for those whose property was wrongfully taken by its agents, though it was lost, destroyed or stolen while in the care and custody of such agents. If cotton were taken from A and B at the same time by the same agent and that belonging to A were shipped to New York, sold and the proceeds of the sale

placed in the treasury, upon proof of these facts A can recover the amount the government received for his cotton. If the cotton of B failed to reach the treasury in the shape of money there is no relief for him or his heirs. After listening to their complaints for half a century, Congress virtually said to the claimants, "I will restore to the owners, upon proper proof, the money in my treasury received from the sale of cotton taken by my agents from individuals after the close of the war. I will not assume liability for cotton lost, stolen or destroyed, or for any, excepting that, the sale of which produced the fund in the treasury." Such are the conditions upon which cotton claimants may recover for their property taken after the war. Such is the character of the money in the treasury received for such cotton. Wherefore it may appropriately be denominated "The Cotton Restitution Fund."

W. F. NORRIS.

Washington, D. C.

GARNISHMENT—INDEMNITOR.

ELLIOTT v. AETNA LIFE INS. CO. OF HARTFORD, CONN.

161 N. W. 579.

Supreme Court of Nebraska. Feb. 21, 1917.

(Syllabus by the Court.)

Where according to the terms of an indemnity policy an insurance company has taken sole and exclusive charge of the defense of an action against the insured for damages for the death of the latter's employe, and a judgment has been rendered against the insured, the liability of the insurance company is subject to garnishment where the insured is insolvent, notwithstanding a provision that "no action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

MORRISSEY, C. J. Plaintiff recovered a judgment against the General Construction Company for the death of her son while in its employ and in garnishment proceedings summoned the Aetna Life Insurance Company, which had insured the General Construction Company against loss resulting from claims for damages on account of injuries or death suffered by any employe. The garnishee denied liability to the judgment debtor on the ground that the latter was insolvent and had not paid the judgment, the policy providing:

"No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

The garnishee was discharged. This action was brought to recover from the Aetna Life Insurance Company for an unsatisfactory answer in the garnishment proceedings. From an order sustaining defendant's demurrer and dismissing the action, plaintiff has appealed.

In addition to the provision quoted, the policy also provided:

"Upon the occurrence of an accident the assured shall give immediate written notice thereof with the fullest information obtainable to the home office of the company at Hartford, Connecticut, or its duly authorized agent. If a claim is made on account of such accident the assured shall give notice thereof with full particulars. The assured shall at all times render to the company all co-operation and assistance in his power.

"If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company's home office every summons or other process as soon as the same shall have been served on him, and the company will, at its own cost, defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same or to pay the assured the indemnity as provided for in condition A hereof.

"The assured, whenever requested by the company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the company previously given, except that the assured may provide at the company's expense such immediate surgical relief as is imperative at the time of the accident."

The petition alleges that the insured complied with the provisions of the contract and surrendered control of the action, that defendant herein conducted all negotiations for settlement, took sole charge of the action against the General Construction Company, and from a judgment in plaintiff's favor took an appeal

to the Supreme Court, where the judgment was affirmed. Elliott v. General Construction Co., 93 Neb. 453, 140 N. W. 1024. It may also be inferred from the petition that the insured was insolvent when the action against it was commenced.

The question presented seems to be: Where, according to the terms of an indemnity policy, an insurance company has taken sole charge of the defense of an action against the insured for damages for the death of the latter's employe, and a judgment has been rendered against the insured, is the liability of the insurance company subject to garnishment where the insured is insolvent, where the policy provides that "no action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue?"

Defendant contends that the policy is an indemnity contract, and that under the terms of the provision just quoted, it is in no case liable to the insured until the latter has actually paid the judgment. In the interpretation of a contract, an admissible and a reasonable construction which will not render it invalid should be adopted. The general purpose of the contract should also be considered. The general object of the indemnity was that losses arising from injuries to employes should not fall upon their employer, but upon the insurer, who by the collection of premiums creates a fund with which to pay such losses. To cheapen the cost of insurance the insurer agreed to defend at its own cost all actions which it should be unable to compromise. The employer surrendered control of the litigation, and the insurer through its attorneys resisted the claim of plaintiff, were unsuccessful, and appealed to the Supreme Court, where the judgment was affirmed. Elliott v. General Construction Co., 93 Neb. 453, 140 N. W. 1024. For every purpose except that of paying the judgment the insurer has been the real litigant. After it has exhausted all legal measures in attempting to defeat plaintiff's claim, it attempts to deprive her of the fruits of the litigation by relying upon the failure of the insolvent employer, the judgment debtor, to pay the judgment as required by the following provision of the contract:

"No action shall lie against the company to recover for any loss or expense under this policy unless it shall be brought by the assured for loss or expense actually sustained and paid in money by him after actual trial of the issue."

This is a proper provision to protect the insurer from claims of the employer before the latter has paid the judgment, since the purpose of the contract was to reimburse him, and not to provide him with funds which he might or might not use to pay a judgment recovered by an employe. This protection is not denied the insurer when through garnishment proceedings after judgment it is compelled to pay a judgment rendered against an insolvent employer. Its obligation under the contract is discharged as fully as if it had paid the employer after he had paid the judgment. Any other construction can serve no purpose except to defeat the collection of plaintiff's judgment. Where the insurer has been the actual litigant it will not be permitted to defeat the collection of the judgment by insisting upon such a construction. The conclusion here reached has been justified by the Supreme Court of Minnesota in the following language:

"Upon the record did it appear that the company, the garnishee, was indebted to the defendant when the disclosure was had? It may be conceded that the company intended so to frame the policy that not every avenue of escape from payment in case of a loss should be closed. The main purpose of its business is to obtain and retain the premiums. The object of the assured is to get protection. The object and purpose of the contracting parties is not to be lost sight of in construing a contract, nor is the rule that in case of ambiguity it must be resolved against the one who prepared the instrument.

"If suit is brought on a claim intended to be covered by this policy, the company, after notice, agreed to defend; but, not only that, it reserved to itself the exclusive right to settle or carry on the litigation, excluding the assured from any interference therewith. On these provisions the company acted, assumed the defense, and has carried on the litigation to the bitter end, even after defendant left this jurisdiction. The assured retained no voice or interest in the litigation. The company substituted its interests and its judgment for that of the assured in the action. By so doing it assumed a relation to this plaintiff, and to every plaintiff where under its policy it steps into a suit, which must be considered in construing the contract. Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but, if under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unable or unwilling to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no inter-

est in the cause of action. A contract between client and attorney, although the attorney has a lien for his fees on the cause of action, is void, if the client is excluded from control of the cause of action. The policy here should be so interpreted, if possible, that its provisions do not run contrary to law, and that result is reached by holding that the undertaking to defend means something more than carrying on litigation in court. * * * We, therefore, hold that, in a policy such as this, where the company has come into the litigation and assumed exclusive control thereof under its contract, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the judgment it so permits to be established, not exceeding the sum stipulated in the policy, and also that, as to the plaintiff, it should be considered that such judgment is a debt due the assured from the company, and not dependent on any contingency. Payment of the judgment, so far as the rights of the company are concerned, in such case, is a mere pro forma matter, and not a condition precedent to its liability to defendant under plaintiff's garnishee proceeding." Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184.

It must be conceded that the majority of courts passing upon this question have taken a different view. The cases are reviewed in Fidelity & Casualty Co. v. Martin, 163 Ky. 12, 173 S. W. 307. The conclusion reached in the present case, however, is in harmony with the general purpose of the contract, promotes justice, and deprives the indemnitor of no legitimate protection.

The Judgment of the district court is therefore reversed, and the cause remanded.

Reversed and remanded.

NOTE.—*Right of Garnishment of Indemnitor for Liability Upon an Executed Contract.*—Employers' Indemnity policies usually contain a clause as follows: "No action shall be brought against the company under or by reason of this policy unless it shall be brought by the Assured for a loss, defined hereunder, after final judgment has been rendered in a suit described hereunder after final judgment has been rendered * * * for a loss that the Assured has actually sustained by the Assured's payment in money." The question has been frequently raised, whether one having a claim against the Assured upon which garnishment may issue can attach the amount due by the company under the policy. Generally it has been held, that the amount is not garnishable.

Fidelity & Casualty Co. v. Martin, 163 Ky. 12, 173 S. W. 307, which held an employe obtaining a judgment against the Assured had no right of garnishment, goes into a full review of the cases said to support its conclusion.

The theory upon which the Martin case proceeds is thus expressed: "Whatever obligation arises out of a contract is due to the person to whom the obligation exists or is made; therefore an action for the breach of a contract can, as a rule, be brought only by one who is a party to the contract. An exception is allowed in the case of the third party for whose benefit a contract is made." This is true, we think, only when the breach does not *ipso facto* operate as a liquidated claim. Thus if one gives his note, payable at a future date, and defaults in payment, his contract to pay according to its terms is one purely between the parties, but no one will claim, that he would not be liable to garnishment at the instance of a third party. The same might be said as to a contract of bailment, the property bailed being subject to the claim of a third party upon a writ of garnishment. But there is no more privity in these contracts than in one to indemnify an assured against loss. A contract of bailment is one indemnifying bailor against loss.

Thus one of the supporting cases is Ford v. Aetna L. Ins. Co., 70 Wash. 29, 126 Pac. 69, relies on the fact that the indemnity is not against a judgment against the Assured but against payment of a judgment, and it cites many cases sustaining this construction. But, if the right of the assured against whom judgment has been rendered, is upon his own motion absolutely to fix liability upon the company by actual payment of the judgment, he certainly has an absolute demand against the company, and where that exists, his creditor, if the right of garnishment means anything at all, has the legal right to stand in his shoes.

One of the cases cited in the Ford case stressed the fact that it was "not the amount of the employe's judgment, but the amount paid by the employer thereon was the sum for which the insurer was liable." Frye v. Bath Gas, etc., Co., 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500. But how does the fact of there existing an absolute right to recover the amount of a judgment, differentiate this from an absolute right to recover on a promissory note or a contract of bailment?

Carter v. Aetna L. Ins. Co., 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N. S.) 1155, says: "Aside from the fact that in its general characteristics the contract is one of indemnity, it contained the specific provision that no recovery could be had * * * unless the action was brought by the bridge company itself to reimburse it for the loss actually sustained and paid in satisfaction of a judgment." Now if the final words "paid," etc., were omitted, could there be any doubt of the right of a third party to garnish the debt? If not, should the law refuse to consider that the debt the company owed the indemnitee is garnishable? If not, why should the assured's absolute right to pay prevent its being garnishable? What is it to the company if it owes, whether the assured complies with the condition or not? And why should the assured, who owes another, be allowed to interpose such a condition? He ought not to be thought to be maturing his right to sue by doing something of no concern to the company, and if of no concern to it why does not the company owe on a judgment being rendered against the assured?

All of the cases appear to go upon the necessity of the assured actually paying the judgment rendered against him, but there seems no doubt of the fact that he is given this right of payment unequivocally. No interposition may be made by the company to his doing this. If he refuses to comply it is like making a gift to the company, but the company does not contract for a gift. If a creditor of the assured were to for-

give him his debt, that is nothing to the company. If he does not forgive he has the right to stand in the shoes of the assured as to anything he might himself sue for.

The trouble with the courts passing on this question is that they have regarded the cases in which it has been sought to recover from the company as employe cases and therefore they speak of the contract not being made for employe benefit. They are, however, merely creditor cases and should be treated from that standpoint.

The case of Patterson v. Adan, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184, and that of Sanders v. Frankfort, etc., Ins. Co., 72 N. H. 485, held the company garnishable, but these cases were upon a sort of estoppel and one of them was in equity. It seems to us, however, that on straight-out reasoning the absolute right of assured to sue gives to his creditors the right to garnish. There is no sensible distinction between judgment against an assured constituting a loss and actual payment of such judgment constituting such loss, assured having the absolute right to sue because of judgment being rendered against him. C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1917—WHEN AND WHERE TO BE HELD.

AMERICAN—Saratoga Springs, N. Y., September 4, 5 and 6.

ALABAMA—Birmingham, July 12, 13 and 14.

ARKANSAS—Hot Springs, May 23, 24 and 25.

GEORGIA—Tybee Island, May 31, June 1 and 2.

IDAHO—Seattle, Wash., July 26, 27 and 28.

ILLINOIS—Danville, May 31, June 1 and 2.

INDIANA—Indianapolis, July 11 and 12.

IOWA—Council Bluffs, June 26 and 27.

KENTUCKY—Louisville, July 6 and 7.

LOUISIANA—Alexandria, May 11 and 12.

MARYLAND—Atlantic City, N. J., the Marlborough-Blenheim, June 21, 22 and 23.

MICHIGAN—Grand Rapids, June 29 and 30.

MISSISSIPPI—Greenville, May 2.

NEW JERSEY—Atlantic City, Hotel Chelsea, June 15 and 16.

OHIO—Cedar Point, July 10, 11 and 12.

OREGON—Seattle, Wash., July 26, 27 and 28.

PENNSYLVANIA—Bedford Springs, June 26, 27 and 28.

SOUTH DAKOTA—Sioux Falls, July 18, 19 and 20.

TEXAS—Houston, July 3, 4 and 5.

WASHINGTON—Seattle, July 26, 27 and 28.

WISCONSIN—Madison, June 27, 28 and 29.

YOUR FLAG AND MY FLAG.

By Wilbur D. Nesbit.

Your flag and my flag,
And how it flies to-day
In your land and my land
And half a world away!
Rose-red and blood-red
The stripes forever gleam;
Snow-white and soul-white—
The good forefathers' dream,
Sky-blue and true-blue, with stars to gleam aright—
The gloried guidon of the day; a shelter through the night.

Your flag and my flag!
To every star and stripe
The drums beat as hearts beat
And fifers shrilly pipe!
Your flag and my flag—
A blessing in the sky;
Your hope and my hope—
It never hid a lie!
Home land and far land and half the world around,
Old Glory hears our glad salute and ripples to the sound!

Your flag and my flag!
And, oh, how much it holds—
Your land and my land—
Secure within its folds!
Your heart and my heart
Beat quicker at the sight;
Sun-kissed and wind-tossed—
Red and blue and white.
The one flag—the great flag—the flag for me and you—
Glorified all else beside—the red and white and blue!

*This poem, by Mr. Nesbit, has been reproduced in many periodicals all over the country and is used with effect in many addresses to point the leading sentiment of the hour. It is a composition of more than ordinary merit, which our readers will no doubt desire to preserve for future use and reference.

CORRECTING AN ERROR.

In our International Law List for December, 1916, the name of James T. Johnson, Republic, Wash., was omitted from its proper alphabetical place. Subscribers will please make the correction.

BOOK REVIEW

CORPORATION MANUAL, 19th EDITION.

This manual by John S. Parker, of New York Bar, Editor, contains all statutory provisions regarding organization, regulation and taxation and taxation of domestic business corporation, and of the admission, regulation and taxation of foreign business corporations of all the states, territories and districts of the United States. All of these are arranged sevealy by a uniform classification; in addition, there is given other statutes regarding corporations, such as Uniform Transfer Act, Laws Regulating Investment Companies, Sale of Corporate Stocks and Securities, and all Federal and State Anti-Trust Laws. This presentation of statute law is supplemented by Forms and Precedents which will be found of much assistance to practitioners. These contain by way of suggestion, charter clauses in alphabetical order as to objects of incorporation and there are forms of acknowledgment by corporations, the manner of keeping minutes and other things so necessary and all useful to be observed. The publication is in one large volume of thinleaved rice paper, running up to more than 2100 pages, the binding is in buckram, in good, clear print, and issues from the Corporation Manual Company of New York, 1917.

BOOKS RECEIVED.

Mental Conflicts and Misconduct. By William Healy, Director Psychopathic Institute, Juvenile Court, Chicago. Price, $2.50. Boston. Little, Brown & Company. 1917. Review will follow.

The Corporation Manual. Statutory Provisions Relating to the Organization, Regulation and Taxation of Domestic Business Corporations, and to the Admission, Regulation and Taxation of Foreign Business Corporations, in the Several States, Territories and Districts of the United States, arranged under a uniform Classification, the Uniform Stock Transfer Act, Laws Regulating Investment Companies and the Sale of Corporate Stocks and Securities and Federal and State Anti-Trust Laws. With Forms and Precedents. Edited by John S. Parker, of the New York Bar. Nineteenth Edition. Price, $15.00. Corporation Manual Company. New York. 1917. Review in this issue.

HUMOR OF THE LAW.

"When you're whipped," said Mr. Dolan, "you ought to say you've had enough."

"If I've the strength left to say I've had enough," replied Mr. Rafferty, 'I'm not whipped yet."—Washington Star.

William Jennings Bryan, at a dinner at the residence of his brother, the mayor of Lincoln, sat next to a girl.

The talk turned to clairvoyance and other ghostly matters and the young lady said to Mr. Bryan:

"Do you ever talk in your sleep?"

"No," Mr. Bryan answered, "but I often talk in other people's. I'm a Chautauqua lecturer."

"Didn't you know that if you struck this pedestrian he would be seriously injured?"

"Yes, sir," replied the chauffeur.

"Then, why didn't you zigzag your car and miss him?"

"He was zigzagging himself, your honor."—Birmingham Age-Herald.

In a rural court the squire had made a ruling so unfair that three young lawyers at once protested against such a miscarriage of justice. The squire immediately fined each of the lawyers $5 for contempt of court.

There was silence, and then an older lawyer walked slowly to the front of the room and deposited a $10 bill with the clerk. He then addressed the judge as follows:

"Your honor, I wish to state that I have twice as much contempt for this court as any man in the room."

A new Wilson story has just come to light, of which a cabinet member is the author. Early in his administration the President invited this particular member of his official family to dinner. The women of the White House were absent at the summer home in New Hampshire and the President was keeping bachelor hall. When dinner was announced the President and his guest arose. The President invited the cabinet officer to precede him into the dining room.

"After you, Mr. President," the cabinet member demurred, following the usual social precedent.

"No, after you, Mr. Secretary," answered the President, a twinkle in his eye. "I insist upon being a gentleman in my own home, even if I am President."—St. Louis Republic.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

1. **Adverse Possession**—Privity of Contract.—Under the doctrine of presumption of grant by continuous adverse possession of land for 20 years while successive possessions must be connected without hiatus, there need be no privity of contract or other legal privity between successive occupants.—Ferguson v. Prince, Tenn., 190 S. W. 548.

2. **Alteration of Instruments**—Material Alteration.—The change of a promissory note, to evidence a conditional vendor's lien upon property given for the note, was material alteration.—Gray v. Williams, Vt., 99 Atl. 735.

3. **Arrest**—Mesne Process.—The fact that debtor owned real estate situated outside the state and intended to go there was not taking with him "means," within the language of Rev. St. c. 114, § 2, authorizing arrest on mesne process; "means" not being method but portable assets, tangible or intangible.—Dunsmore v. Pratt, Me., 99 Atl. 717.

4. **Attachment**—Bond.—In action upon joint and several bond substituted for attached property, wherein the defendants in the attachment action were principals, and a third party was surety, fact that one of principals had been dropped from attachment action did not increase liability of other parties to bond so as to discharge surety.—King v. Malone, Conn., 99 Atl. 691.

5. **Attorney and Client**—Courtesy.—Rule of courtesy among members of bar, that each will render services to others without expectation of reward other than by way of similar services, cannot be strained to meet case of one who, having practically withdrawn from profession, demands such courtesy as aid in accumulating wealth in another pursuit.—Thigpen & Herold v. Slattery, La., 73 So. 780.

6.——Disbarment.—The mere fact that a petition for disbarment of an attorney was entitled, "In the Supreme Court of the State of Oregon in and for Multnomah County," did not invalidate it ,but the addition of the words naming the county was clerical error, and could not mislead defendant.—State v. Greenfield, Ore., 162 Pac. 858.

7.——Disbarment.—Findings that the accused attorney had fraudulently secured release of his mortgage, and converted to his own use money deposited with him by a client, and had fraudulently secured signatures of heirs to an agreement for a fee and assignment, by which he collected and converted their money, warrant disbarment.—In re Van Ruschen, S. D., 160 N. W. 1006.

8.——Employment.—The rule prohibiting an attorney once retained from acting for the opposing party applies only in case of conflicting interest, in the absence of a contract.—Laybourne v. Bray & Shifflett, Tex., 190 S. W. 1159.

9. **Bankruptcy**—Book Account.—Where bankrupt joined with trustee and purchaser of claim in action against railroads for damage to shipment of corn, purchaser's right to sue held not affected by judgment of bankruptcy court describing property sold him merely as "book accounts."—Southern Ry. Co. v. Avey, Ky., 191 S. W. 460.

10.——Corporation.—Where a corporation declares dividends though no profits are earned, trustee in bankruptcy may recover such dividends from stockholders for benefit of subsequent creditors.—Mackall v. Pocock, Minn., 161 N. W. 228.

11.——Retention of Title.—Trustee in bankruptcy of buyer of suit of clothes for $20, who paid $3 of price, seller retaining title by contract in writing, held not bound to interfere with seller's action in detinue in state court to enforce security, unless there was a reasonable ground for believing that surplus would be realized.—Hardcastle v. National Clothing Co., Tenn., 191 S. W. 524.

12. **Banks and Banking**—Collateral.—Bank notifying drawer of draft, with bill of lading attached, that it has sufficient collateral to pay it, and guaranteeing payment, on faith of which drawer delivers bill of lading and relies solely upon bank for payment, becomes liable on an original and enforceable undertaking.—Bank of Omega v. Wingo, Ellet & Crump Shoe Co., Ga., 91 S. E. 251.

13.——Pensions.—The stockholders of a national bank have the incidental power to create a pension fund to be shared by officers and employes.—Heinz v. National Bank of Commerce in St. Louis, U. S. C. C. A., 237 Fed. 942.

14.——Presumptive Knowledge.—Where officer of a bank is personally interested in a transaction to which bank is a party in interest, bank

is not charged with knowledge acquired by officer in regard to transaction as he will not be presumed to impart knowledge which is adverse to his own interest unless officer acts for both banks or is sole representative of bank with which he deals.—Ohio Valley Banking and Trust Co. v. Citizens' Nat. Bank, Ky., 191 S. W. 433.

15.——Rescission.—Plaintiff, induced by fraudulent representations of president of bank to subscribe for its stock, giving note, held entitled to rescission of subscription contract, and to cancellation of note, in banking commissioner's action thereon on the bank's insolvency.—Smith v. Jones, Ky., 191 S. W. 500.

16. **Bills and Notes**—Accommodation Maker.—Where, contrary to the agreement upon which a neighbor, for accommodation, signed a note as joint maker, that the accommodated maker should discount it at a bank for cash, the accommodated maker negotiated it after maturity for corporate stock, the accommodation maker was not liable to a transferee after maturity, under Rev. St. 1909, § 10028, as to holders in due course.—Schlamp v. Manewal, Mo., 190 S. W. 658.

17.——Descriptio Personae.—Under Negotiable Instruments Law (Rev. St. 1909, § 9991) as to form of signature on notes, where notes given for a piano purchased by a corporation were signed by the corporation and by another person with no official designation, the latter signer was liable to the payee, although in fact secretary of the corporation and intending to sign as such.—Rudolph Wurlitzer Co. v. Rossmann, Mo., 190 S. W. 636.

18.——Designatio Personae.—A corporation's president, by writing his mere name upon the back of the company's note, without the addition of any qualifying language, became an indorser, under Negotiable Instruments Law, § 113.—Mechanic v. Elgie Iron Works, N. Y., 163 N. Y. Supp. 97.

19.——Notice of Dishonor.—Where a note was not negotiated before maturity, but remained in the hands of the original obligees, a maker and original obligor was not entitled to notice of dishonor or nonpayment thereof under Negotiable Instruments Law, Ky. St. § 3720b, subsecs. 102-104.—Sim v. Citizens' Bank of Carrsville, Ky., 191 S. W. 489.

20.——Pleading and Practice.—Where defendant pleaded he executed a note as a stockholder of bank for amount of par value of his stock under agreement that, should bank recover losses sustained, the recovery should be applied to notes given by several stockholders, only issues raised were existence of agreement and amount of credit.—Thompson v. Citizens' Bank, Ga., 91 S. E. 84.

21. **Carriers of Goods**—Connecting Carrier.—Act Cong. June 29, 1906 (Carmack Amendment to Hepburn Act), does not prohibit a common-law action against a connecting carrier for injury to interstate shipment caused by negligence of connecting carrier.—Cincinnati, H. & D. Ry. Co. v. Quincy & Rogers, Ga., 91 S. E. 220.

22.——Initial Shipment.—Where shipment of ore subject to Interstate Commerce Act was unloaded at sampling works siding, sampled, reloaded, and sealed, there was an initial shipment from siding, so that under uniform bill of lading carrier was not liable where metallics were stolen from car before attached to train.—Siebert v. Erie R. R., N. Y., 163 N. Y. Supp. 111.

23.——Intermediate Carrier.—Under Carmack Amendment to Interstate Commerce Act, shipper over connecting lines still has remedy against intermediate carrier for loss occuring on its line only.—Southern Ry. Co. v. Avey, Ky., 191 S. W. 460.

24.——Lien.—Where a person furnishes and delivers materials and includes cartage expenses in the price of the materials, his statutory lien upon the completed structure may include cartage expenses as well as the price of the materials.—Siler Mill Co. v. Charles Nelson Co., Wash., 162 Pac. 590.

25.——Lien.—Where contract of interstate shipment is invalid because made at rate other than that prescribed by published schedule rates, carrier under Rev. Laws 1910, §§ 847, 3845, 3852, has a lien for charges.—St. Louis, I. M. & S. Ry. Co. v. McNabb, Okla., 162 Pac. 811.

26.——Switching Arrangements.—Under provision of uniform bill of lading that property received from private or other sidings should be at owner's risk until cars were attached to trains, track on carrier's right of way parallel to its main track and connected therewith by two switches was a siding, and within the term "other sidings."—Bers v. Erie R. Co., N. Y., 163 N. Y. Supp. 114.

27. **Commerce**—Congressional Inaction.—Congressional inaction leaves a state free to impose such burden on interstate commerce as may result from Gen. Code Ohio, §§ 6373—1 to 6373—24, forbidding sale of corporate stock within state without state license.—Hall v. Geiger-Jones Co., U. S. S. C., 37 Sup. Ct. 217.

28.——Employe.—Under federal Employers' Liability Act, an employe may have duties involving both interstate and intrastate commerce, and where plaintiff, regularly employed in replacing old rails, was, when accident occurred, loading old rails lying on right of way, he was not then engaged in interstate commerce.—Cincinnati, N. O. & T. P. Ry. Co. v. Hansford, Ky., 190 S. W. 690.

29.——Employers' Liability Act.—The common-law liability of a railroad company, when engaged in intrastate commerce continues despite the federal Employers' Liability Act, and the right to recover from it when so engaged is based on the common law.—Hogarty v. Philadelphia & R. Ry. Co., Pa., 99 Atl. 741.

30.——Installation.—Contract by foreign corporation which has not complied with the laws (Gen. St. 1913, §§ 6206, 6207) for sale to resident of machine coupled with agreement to install same is not protected as interstate commerce, agreement for installation not being essential part of sale; hence contract is unenforceable.—Palm Vacuum Cleaner Co. v. Bjornstad, Minn., 161 N. W. 215.

31. **Compromise and Settlement**—Equity.—Although Rev. St. 1909, § 1812, providing that when a release is pleaded in bar, the reply may allege fraud, etc., changed the rule that a re-

lease can only be set aside in equity, the statute was not intended to change the rules governing rescission of contracts of settlement for fraud. —Wessel v. Wm. Waltke & Co., Mo., 190 S. W. 628.

32. **Constitutional Law**—Blue Sky Law.—Const. U. S. Amend. 14 does not prevent state from enacting under its police power Laws S. D. 1915, c. 275, forbidding, with certain exceptions, sale of corporate securities without a license and without the approval of the state securities commission.—Caldwell v. Sioux Falls Stockyards Co., U. S. S. C. 37 Sup. Ct. 224.

33.——Due Process Clause.—An order of the state Public Service Commission requiring passenger service on a branch road is not in violation of due process of law and equal protection of the laws, under Const. U. S. Amend. 14, though passenger service alone may entail pecuniary loss, where under local law (Acts W. Va. 1881, c. 17, §§ 69, 71) such branch line was devoted to transportation of passengers as well as freight, though actually used for the latter.—Chesapeake & O. Ry. Co. v. Public Service Commission of West Virginia, U. S. S. C., 37 Sup. Ct. 234.

34.——Fourteenth Amendment. — Pub. Acts Mich. 1915, No. 46, does not deny equal protection of the laws because exempting from its operation securities listed in any standard manual approved by the state securities commission, and authorizing commission when necessary to suspend sale of securities.—Merrick v. N. W. Halsey & Co., U. S. S. C., 37 Sup. Ct. 227.

35.——License.—Gen. Code Ohio, §§ 6373—1 to 6373—24, requiring license as condition precedent to dealing in corporate securities, is not invalid as preventing purchases and shielding purchasers from loss of property because of their own defective judgments.—Hall v. Geiger-Jones Co., U. S. S. C. 37 Sup. Ct. 217.

36. **Contempt**—Newspaper Publication.—Publications in newspapers sold in the city where the court sat, etc., tending to obstruct administration of justice, held direct contempt, punishable under Judicial Code, § 268.—Toledo Newspaper Co. v. United States, U. S. C. C. A., 237 Fed. 986.

37. **Customs and Usages**—Fraud.—In action against automobile manufacturer for agent's fraud, evidence by defendant of a custom among motor car manufacturers of using such terms as "agents" and "commissions" in a sense opposite to their legal and generally understood meaning was inadmissible; it being a palpable distortion of common terms.—Renick v. Brooke, Mo., 190 S. W. 641.

38. **Damages**—Market Value.—Where there is no market value of property in question at the place where such value would generally be determined, the market value at other places, with cost of transportation, etc., may be shown.—Louisville & N. R. Co. v. Dickson, Ala., 73 So. 750.

39. **Death**—Evidence.—An allegation, in the petition in an action for wrongful death, that deceased was 17 years old and unmarried at time of death and lived with his parents as a member of their family, held not to negative the existence of children of deceased having a primary right to sue under the Employers' Liability Act (Acts 1909, p. 160; Civ. Code 1910, §§ 2781, 2782).—Lamb v. Tucker, Ga., 91 S. E. 66.

40. **Deeds**—Fraud.—Where the grantor of land had several years to consider trade and in which to sell to others for a higher price, which she could not do, and at time of execution of deed consideration paid was sufficient, neither defendant nor its agents were guilty of fraud, oppression, or coercion in urging her to convey land in accordance with her contract with defendant.—Finlayson v. Cuyuga Coal & Coke Co., Ky., 191 S. W. 486.

41. **Divorce**—Custody of Children.—In action concerning custody of minor child of the parties, which, upon their divorce, had been awarded to defendant, begun without any ground therefor, judgment for defendant for costs and attorney's fees, without findings of fact or conclusions of law, will be reversed.—Styles v. Styles, N. D., 161 N. W. 198.

42.——Evidence.—In action by wife for limited divorce, evidence tending to show that defendant married for the double purpose of obtaining a housekeeper and obtaining possession of her money held to entitle plaintiff to relief asked.—Phillips v. Phillips, Ky., 191 S. W. 482.

43.——Legal Discretion.—Where testimony of plaintiff, if believed, entitled her to divorce, and was corroborated by her mother, refusal to grant divorce without hearing testimony of defendant is an abuse of legal discretion requiring reversal and remand.—Brueggerman v. Brueggerman, Tex., 191 S. W. 570.

44. **Frauds, Statute of**—Oral Contract.—Piping a house for gas and slight expenditure for wallpaper held so insignificant as not to amount to improvements taking an oral contract for sale of the land out of the statute of frauds (Vernon's Sayles' Ann. Civ. St. 1914, art. 3965, subd. 4).—Ryan v. Lofton, Tex., 190 S. W. 752.

45. **Fraudulent Conveyances**—Insolvency. — Where the alleged fraudulent transfer was made when transferor was not insolvent and did not render him insolvent, the conveyance cannot be set aside as in fraud of creditors.—Christopher-Simpson Iron Works Co. v. Bajohr, Mo., 190 S. W. 615.

46.——Notice of Intent.—Where plaintiff obtained judgment against town marshal and a surety on his bond, before judgment was rendered, conveyed a tract to his father-in-law to defeat collection of plaintiff's judgment and grantee acting for himself, and wife had notice of such fraudulent intent, the conveyance was properly set aside.—Rickett v. Bolton, Ky., 191 S. W. 471.

47.——Services Rendered.—Indebtedness for services rendered in pursuance of express or implied contract, or quantum merult indebtedness for services, was such indebtedness as would render gift deed by debtor void as to prior creditor, under Rev. St. arts. 3966, 3967.—Stolte v. Karren, Tex., 191 S. W. 600.

48. **Guaranty**—Conditional.—Where liability of promisor is fixed by mere default of principal, it is an "absolute guaranty," but if promisor's liability depends upon any other event than principal's nonperformance, it is "conditional guaranty."—D. T. Williams Valve Co. v. Amorous, Ga., 91 S. E. 210.

49. **Highways**—Assumption of Conduct.—Automobile driver on highway, seeing that team on left side thereof, may assume that the driver will go to the right side, until it becomes obvious that he was making no effort to do so, or that danger of collision was imminent.—Cook v. Standard Oil Co., Ala., 73 So. 763.

50.——County Bonds.—Const. art. 3, § 52, as amended in 1903, authorizing counties, etc., to issue bonds to construct "paved" roads, empowers counties, etc., to construct shell roads.—Aransas County v. Coleman-Fulton Pasture Co., Tex., 191 S. W. 556.

51. **Homestead**—Liens.—Where debt against homestead was secured by lien and assignment of judgment against third person, the lienholder, as against set-off in favor of judgment debtors accruing subsequent to assignment, was required by law to apply judgment to payment of debt at debtor's request before selling homestead under the lien.—Pease v. Randle, Tex., 191 S. W. 566.

52.——Town Lots.—Where a man and wife reside in a building upon two ordinary town lots owned by them for several years, and have no other home, such building, though they conduct a hotel therein, will be deemed their homestead. —Foltz v. Maxwell, Neb., 161 N. W. 254.

53. **Insurance**—Accident.—Under accident insurance policy covering "the effects of bodily injuries sustained directly, solely, and exclusively through accidental means," it was necessary to show that in act preceding injury causing death there was something unforseen, unexpected and unusual.—Fulton v. Metropolitan Casualty Ins. Co. of New York, Ga., 91 S. E. 228.

54. Burden of Proof.—Where under accident policy suit is brought for entire and irrecoverable loss of an eye, plaintiff must show that the loss is both entire and irrecoverable.—Wilkins v. Georgia Casualty Co., Ga., 91 S. E. 224.

55.——Estoppel.—Where a mutual assessment company sets out in certificate synopsis of by-laws, leading insured to believe that it contains all provisions applicable, insured may rely on such synopsis, and company is estopped to deny liability under a by-law which insured was led to overlook or believe had no application.—Bierbach v. Mutual Benefit Health & Accident Ass'n, Neb., 161 N. W. 251.

56.——Evidence.—An admission by an applicant for an accident policy that he was a farm foreman would necessarily be limited to the time when it was made, and was not an admission that this was his occupation when he was subsequently injured by accident.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Black, Ala., 73 So. 757.

57.——Fraternal Association.—Where member of fraternal insurer appears at trial before committee and is expelled, judgment being one which committee has authority to make, such member must pursue the appeal given to supreme body of order and cannot appeal to courts. —National Council of Knights & Ladies of Security v. Turovh, Minn., 161 N. W. 225.

58.——Place of Contract.—Where insurance policy was issued by Missouri corporation and signed by its officials in Missouri, but insured and beneficiary were residents of Illinois, and policy was delivered there, it was an Illinois contract.—Lukens v. International Life Ins. Co., Mo., 191 S. W. 418.

59.——Stipulations. — Where insured merely ordered insurance on certain property which the agent said he would write and leave for him with a bank, the policy held not avoided by its stipulation that it should be avoided by existing insurance, where insured had not taken policy from bank when loss occurred, Ky. St., § 639, not applying.—Springfield Fire & Marine Ins. Co. v. Snowden, Ky., 191 S. W. 439.

60.——Total Disability.—The meaning of the phrase "total disability" in an accident policy is relative, depending on the particular circumstances, and is a question of fact for the court or jury trying the case.—American Liability Co. v. Bowman, Ind., 114 N. E. 992.

61.——Waiver.—A written application by an employe for an employe's fidelity bond, which expressly stipulated that he would reimburse surety company for loss sustained by it on account of bond, did not constitute waiver on part of company of provision in bond that it would be invalid unless signed by employe.—National Surety Co. v. Rieves, Miss., 73 So. 732.

62. **Intoxicating Liquors**—Evidence.—Act No. 202 of 1914, and Act No. 23 of Ex. Sess., 1915, relating to the keeping and admission in evidence of records showing shipments of intoxicating liquors into dry territory, ex vi termini, have no application to shipments into wet territory.—State v. Maddox, La., 73 So. 783.

63.——Indictment.—An indictment under Acts 1916, c. 31, § 2 (9F), forbidding leasing grounds for Sunday liquor-using picnics, need not state specifically the location of the property, where the ownership by defendant of the premises within the county is alleged.—Benesch v. State, Md., 99 Atl. 702.

64.——Intent.—As to offense of keeping liquors on hand at defendant's place of business, quantity kept was immaterial.—Harper v. State, Ga., 91 S. E. 231.

65.——Police Power.—Statutes forbidding storing and delivering of intoxicating liquors in one state for sale in another state are within the police power of the state and constitutional.—State v. Theodore, Mo., 191 S. W. 422.

66. **Licenses**—Privilege Tax.—Laws 1914, c. 112, § 1, imposing a privilege tax to state of $2,000 per annum upon money loaning business where a greater rate of interest than 20 per cent per annum is charged, held not unconstitutional because imposed only on such businesses.—State v. Rombach, Miss., 73 So. 731.

67. **Limitation of Actions**—Federal Employers' Liability Act.—After expiration of the two-year limitation prescribed by the act, a railroad employe, whose statement of claim set forth a common-law action, cannot amend the same so as to bring it within federal Employers' Liability Act.—Hogarty v. Philadelphia & R. Ry. Co., Pa., 99 Atl. 741.

68.——Starting Point.—The two-year statute of limitations does not begin to run against a railroad corporation which had resumed possession of its property after receivership for acts of the receivers until the resumption of possession.—Kansas City, M. & O. Ry. Co. of Texas v. Weaver, Tex., 191 S. W. 591.

69. **Master and Servant**—Assumption of Risk. —Under federal Employers' Liability Act, railroad brakeman killed between two cars when engineer failed to obey his stop signal held not to have assumed risk in placing himself before standing car; the engineer's act being that of the master.—Gulf, C. & S. F. Ry. Co. v. Cooper, Tex., 191 S. W. 579.

70.——Casual Employment.—One employed as foreman over other carpenters in the erection of a building, involving several months of regular labor, is not "casually" employed within the Workmen's Compensation Act.—Miller & Lux v. Industrial Acc. Commission of California, Cal., 162 Pac. 651.

71.——Farm Labor.—A carpenter constructing a cottage for a large corporation on one of its ranch properties does not come within the express exclusion of Workmen's Compensation Act, § 14, as one engaged in "farm labor."—Miller & Lux v. Industrial Acc. Commission of California, Cal., 162 Pac. 651.

72.——Jurisdiction.—Under Rev. Code 1915, §§ 6604—1, 6604—2, 6604—27, stevedore injured while in the hold of a ship unloading it in navigable waters of Puget Sound was not within the act, and that his rights and remedies remained unimpaired.—Shaughnessy v. Northland S. S. Co., Wash., 162 Pac. 546.

73.——Negligence.—A mechanic, who participated in efforts to extinguish a fire in a mine, held entitled to have the company use ordinary care, so as not to increase his injury; so it was negligence to start a fan without warning, disseminating smoke, and resulting in his injury.—Western Coal & Mining Co. v. McCallum, U. S. C. C. A., 237 Fed. 1003.

74.——Res Ipsa Loquitur.—Railroad conductor injured in rear end collision when his train was pulling onto siding to make way for another train, made out a prima facie case when he proved rule requiring trains not to exceed six miles per hour on an obstructed track, and that the train which collided with his was going at a greater rate of speed, while he was conforming to the rule.—Louisville & N. R. Co. v. Mitchell, Ky., 191 S. W. 465.

75. **Municipal Corporations**—Breach of Contract.—Where corporation breached its contract for reduction of garbage by refusing to receive further garbage, subsequent offers in writing to perform contract were ineffective to nullify

breach or affect the city's right of action.—City of Bridgeport v. Aetna Indemnity Co., Conn., 99 Atl. 566.

76.——Estoppel. — A municipality is not estopped from passing an ordinance prohibiting keeping of gasoline, etc., in quantities within 300 feet of a dwelling, etc., by having once required the tanks of an oil company in the municipality to be moved to an approved site.—Pierce Oil Corp. v. City of Hope, Ark., 191 S. W. 405.

77.——Governmental Duty.—A municipal corporation, without any statutory requirements, is not bound to light its streets with lamps, and from exercise of its discretion as to whether it will do so or not no liability arises.—City of Greensboro v. Robinson, Ga., 91 S. E. 244.

78.——Highway.—A speedway in a park, elliptical in shape, used for horse racing and exercising, subject to prescribed rules of the park commissioner, is not a "highway" and law of road has no applicability to it.—Eckert v. Levinson, Conn., 99 Atl. 699.

79. **Names**—Plea in Abatement.—Where defendant was indicted as "Golson," the plea in abatement alleging that her correct name was "Gholston" is insufficient.—Golson v. State, Ala., 73 So. 753.

80. **Negligence**—Ejection of Intruder.—Where saloon keeper ejected drunken man with such force that he fell on child on sidewalk, he is not relieved of liability as to the child because his conduct as to intoxicated person was rightful.—Feeney v. Mehlinger. Minn., 161 N. W. 220.

81. **Neutrality Laws**—Violation of.—It is no defense to a prosecution under Penal Code, § 13, for conspiring to prepare a military expedition from the United States against the United States of Mexico, with which the former was at peace, that the government controlling Mexico had not been recognized.—De Orozco v. United States, U. S. C. C. A., 237 Fed. 1008.

82. **Payment** — Evidence. — Checks marked "paid" offered in evidence on an action of assumpsit, in connection with testimony of witnesses tending to show payment thereof, were properly admitted.—McDonough v. Commercial State Bank, Ala., 73 So. 754.

83. **Principal and Agent**—Fraud.—In an action against an automobile manufacturer for agent's fraud, correspondence between the principal and the alleged agent and between the principal and third persons tending to show that the alleged agent was in fact the general agent of the principal, and was being held out to the world as such, was admissible.—Renick v. Brooke, Mo., 190 S. W. 641.

84. **Railroads**—Anticipatory Injury.—Railroad whose train approached its crossing in village of about 200 population, used by from 75 to 100 people daily, was under duty to anticipate presence of persons on track at crossing.—Cincinnati, N. O. & T. P. Ry. Co. v. Hughes, Ky., 191 S. W. 495.

85.——Contributory Negligence.—Where decedent, who was deaf, and had been warned of danger, attempted to cross a trestle, he was guilty of contributory negligence, though before reaching trestle he stopped, looked and listened to ascertain whether a train was approaching from rear, the view being somewhat obstructed.—Nashville, C. & St. L. Ry. v. Wyette, Ga., 91 S. E. 69.

86.——Crossings.—Party invited to cross railroad crossing by conduct of road, its employes or agents, or even directly by an employe, is not justified in acting as though the crossing were not dangerous.—Hayes v. New York, N. H. & H. R. Co., Conn., 99 Atl. 694.

87.——Negligence per se.—A deaf person who voluntarily stands at a railroad crossing dangerously near the tracks on which an expected train is approaching, where he cannot see signals or the train, and is struck, is guilty of negligence barring recovery.—Nelson v. Texas & P. Ry. Co., La., 73 So. 769.

88. **Sales**—Antecedent Debts.—The mere taking by transfer and bill of sale of the business and accounts of a person, without any assumption of indebtedness, will not make the transferee liable for antecedent debts growing out of the business.—Texas Auto & Supply Co. v. Magnolia Petroleum Co., Tex., 191 S. W. 573.

89.——Express Warranty.—A positive representation, by the agent of the seller of an automobile, to induce the buyer to make the purchase, that the car was a 1912 model, constituted when acted upon an express warranty.—Morris v. Fiat Motor Sales Co. of California, Cal., 162 Pac. 663.

90.——Rescission.—Where defendant, in suit upon notes for purchase price of a locomotive, filed a counterclaim asking for cancellation of unpaid notes and recovery of payments made, this was a rescission of the contract.—Glover Mach. Works v. Cooke-Jellico Coal Co., Ky., 191 S. W. 516.

91.——Special Warranty.—Where defendants ordered "one 30 horsepower engine," on order blank containing no warranties, except that machinery would be of good material, and equal or better than any other machine of equal size and proportions when properly handled, there was no warranty as to horsepower.—J. I. Case Threshing Mach. Co. v. Copren Bros., Cal., 162 Pac. 647.

92.——Special Warranty.—Where a written contract for sale of mule warranted that it was about ten years old, and declared seller warranted only title thereto, statements should be construed as warranting that mule was about ten years old, but not warranting its fitness for work.—McDew v. Hollingsworth, Ga., 91 S. E. 246.

93. **Sunday**—Bail Bond.—A bail bond executed on Sunday, given to secure the release of one arrested in Texas on a charge of violating the federal law, is valid under the Texas laws, which govern, pursuant to Rev. St. § 1014 (Comp. St. 1913, § 1674).—De Orozco v. United States, U. S. C. C. A., 237 Fed. 1008.

94.——Sales.—The selling on Sunday by a confectioner of soda water, soft drinks, coca cola, cigars, and tobacco, violates the Sunday law, notwithstanding incidental sale of sandwiches, canned goods, etc.—McAfee v. Commonwealth, Ky., 190 S. W. 671.

95. **Vendor and Purchaser** — Deficiency.—Where a contract for the purchase of land described it by metes and bounds and ended, "containing 32 acres more or less," the plain meaning is that parties are to run risk of gain or loss, and if there is only a trifle less than 32 acres, the shortage is not material.—Andrews v. Sercombe, Ore., 162 Pac. 836.

96.——Record Notice.—Actual knowledge by a purchaser of land of a deed of trust thereon imposes on him no greater duty of inquiring into the state of the title than does constructive notice from the fact of its being recorded.—Barksdale v. Learnard, Miss., 73 So. 736.

97.——Tender.—Where agreements in contract for sale of land as to conveyance free of incumbrance, and as to payment of balance of purchase price was mutual and dependent, neither could recover against other for nonperformance without offering or tendering performance, or showing some excuse therefor.—Phillips v. Sturm, Conn., 99 Atl. 689.

98. **Waters and Water Courses**—Estoppel.—Where the owner of land traversed by a creek, sold a part of it to a municipality, covenanting that the municipality should have the right to take water for necessary purposes, and thereafter sold the remainder of the tract, the municipality cannot dam the creek so as to render lands of second grantee wet and unfit for cultivation.—City of Jackson v. Wilson, Ga., 91 S. E. 63.

99. **Wills**—Presumption of Testacy.—Where the testator in terms devises "all of his estate, real and personal," the presumption is that he did not intend to die intestate as to any part of it, and his will, if possible, will be so construed.—Hale v. Neilson, Miss., 72 So. 1011.

100.——Testamentary Instrument.—An instrument executed by three brothers, providing that on the death of one his interest in the property should vest in the others, so that the business might be carried on without interruption, held testamentary in character, so as not to operate as a deed.—Thomas v. Byrd, Miss., 73 So. 725.